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Office of Administrative Law Judges
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DATE: August 23, 2000

CASE NO: 1999-INA-306

In the Matter of

PAULETTE DELLA VOLLA
Employer

on behalf of

EVELYN GLORIOSO
Alien

Certifying Officer: Richard E. Panati, Region III

Before: Huddleston, Jarvis and Burke
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER FOLLOWING REMAND

This case arises from Paulette Della Volla's ("Employer") request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for alien labor certification. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is

to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of the United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

Statement of the Case

On June 23, 1997, the Employer filed a Form ETA 750 Application for Alien Employment Certification on behalf of the Alien, Evelyn Glorioso. (AF 25-26). The job opportunity was listed as "Domestic Cook". (AF 25). The job duties were described as follows:

> To prepare meals for private household throughout the day with special menus for low calorie foods with strict dietary guidelines.

(Id.). The stated job requirements for the position, as set forth on the application are the completion of high school and two years experience in the job offered or in food service. (Id.).

On April 5, 1999, this matter was remanded under 1999-INA-045 for the purpose of allowing the CO to issue a supplemental NOF for reevaluation of the application consistent with the *en banc* decisions in *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*), *Daisy Schimoler*, 1997-INA-218 (Mar. 3, 1999) (*en banc*) and *Elain Bunzel*, 1997-INA-481 (Mar. 3, 1999) (*en banc*). (AF 19-21).

The CO issued a supplemental Notice of Findings ("NOF") on May 12, 1999, consistent with the guidelines established in the case of *Carlos Uy III*. (AF 22-24). The CO found that the job opportunity must be clearly open to U.S. workers, citing section 656.20(c)(8). The CO noted that the application contained insufficient information to determine whether the position of Domestic Cook actually exists in Employer's household or whether the job was created solely for the purpose of qualifying the alien as a skilled worker under current immigration law. The CO set forth a series of twelve questions designed to establish whether the position was *bona fide*, or was created solely for the Alien to fit her within a skilled worker category for immigration purposes. The CO very explicitly stated that merely answering the questions would not be sufficient to rebut the NOF; documentation was important and all responses and documentation would be evaluated. (AF 23-24).

The Employer submitted his rebuttal to the NOF on May 15, 1999, in the form of a letter from Employer containing answers to the questions posed by the CO, certification of Alien's previous employment and Employer's tax return from 1998. (AF 11-18). Employer explained that she entertains only on a casual basis and addressed the home schedules of herself and her husband. (AF 11). Employer asserted that she would be out of the home from 3:00 a.m. until 8:00 p.m. and her husband would be out of the home from 5:30 a.m. until 4:30 p.m. The Cook would prepare three meals a day for each of the two adults, Monday through Friday, and also shop for food, maintain monthly food budget and accounting for all purchases on a daily basis, and be responsible for setting the table, decorations and related items. (Id.). The tax returns were provided to document the ability to pay the salary of the cook. (13-18). Finally, Employer stated that there are no children in the household, no other domestic workers are employed in the household, Employer has never before employed a domestic cook and, there is no special relationship between Alien and Employer. (AF 12).

The CO issued a Final Determination ("FD") on July 28, 1999, denying certification. (AF 9-10). The CO found that Employer failed to establish that there is a bona fide position for a Domestic Cook in

Employer's household, in violation of 20 C.F.R. § 656.20(c)(8). (AF 10). The CO found that the rebuttal evidence shows that it is:

> more likely that the alien will be employed as a General Houseworker than a Domestic Cook. Your rebuttal evidence does not show that you entertain frequently or that the alien will be involved on a full-time basis preparing meals for family members to consume. Most family members are outside the home working for the greater part of the alien's daily work schedule.

(Id.). For these reasons, the CO found that while the alien may cook some meals, it is "implausible that the alien will be engaged as a full-time Domestic Cook because there is no one at home to eat most of the meals that the alien supposedly will prepare and serve." (Id.).

The Employer filed a Request for Review on August 31, 1999. (AF 1-8). The file was then forwarded to the Board of Alien Labor Certification Appeals ("BALCA") for review.

Discussion

The Employer bears the burden in labor certification of both proving the appropriateness of approval and ensuring that a sufficient record exists for decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997); *Carlos Uy III*, 1997-INA-304 (March 3, 1999)(*en banc*). In *Carlos Uy, III*, the Board held that a CO may properly invoke the *bona fide* job opportunity analysis authorized by 20 C.F.R. 656.20(c)(8) if the CO suspects that the application misrepresents the position offered as skilled rather than unskilled labor in order to avoid the numerical limitation on visas for unskilled labor. When the CO invokes section 656.20(c)(8), however, administrative due process mandates that he or she specify precisely why the application does not appear to state a bona fide job opportunity.

In this case, the NOF was clear and specific. It set out twelve very specific areas for Employer to address, and specifically warned Employer to document and support answers, for merely responding would not be sufficient. The areas inquired to by the CO are generally those set out in *Uy, supra*, which

addressed the totality of circumstances test in domestic cook cases, and would provide a basis for determining if the position is indeed *bona fide*.

The Employer responded to the NOF with undocumented assertions about the number of meals and the schedule of Alien. The Employer asserted that entertaining is performed only on a casual basis and therefore the Alien's duties were limited to preparing breakfast, lunch and dinner for Employer and her husband, in addition to shopping, maintaining a monthly budget, setting the table, and cleaning the kitchen. (AF 5). The rebuttal failed to explain how a cook arriving six hours after Employer leaves and over three hours after her husband leaves will prepare breakfast for them, or how the family will eat a lunch prepared by the cook if they are not home. In addition, Employer does not arrive home in the evenings until three hours after the Alien has left for the day. Finally, no documentation aside from the tax returns and certification of Alien's work history were provided with the Rebuttal. While the Rebuttal was responsive to the questions set forth in the NOF, it was not complete. We note that Employer offered a brief explanation of the scheduling conflicts between the Alien's work hours and the Employer's family's work schedules in its Request for Review, but merely stated the Alien's hours in her Rebuttal. Even this explanation, however, was not specific and was not documented.[1] Under the totality of circumstances test set out in *Uy, supra*, the CO properly denied labor certification. Where the CO requests a document or information which has a direct bearing on the resolution of the issue and is obtainable by reasonable effort, the employer must produce it. *See Gencorp*, 1987-INA-659 (Jan. 13, 1989) (*en banc*). Employer's bare assertions are insufficient to carry the Employer's burden of proof required to sustain alien labor

[1]In her Request for Review, Employer explained that the Alien "will be asked to adjust her work hours to suit the needs of her employer. ... Consumption of the meals which the alien prepares can be performed at any time; the same day, the following morning, etc. Since the members of the household have varying schedules, the alien will be asked to adjust her schedule as well with any overtime being paid at time and one-half." (AF 2). This argument was raised for the first time with the Request for Review. Such evidence is not part of the record, as it was not before the CO and a part of her decision. *Databyte Technology, Inc.*, 1993-INA-263 (June 28, 1994). *See also Tevere 84 Restaurant*, 1993-INA-269 (Aug. 17, 1994); *Judy Roberts Productions*, 1994-INA-113 (Nov. 10, 1994).

certification. *See Jane B. Horn*, 1994-INA-6 (Nov. 30, 1994); *Dr. Daryao S. Khatri*, 1994-INA-16 (Mar. 31, 1995).

Accordingly, we find the CO's denial of certification was proper.

Order

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

For the Panel:

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DONALD B. JARVIS

Administrative Law Judge

San Francisco, California